

Fred W. Schwinn (SBN 225575)
CONSUMER LAW CENTER, INC.
12 South First Street, Suite 1014
San Jose, California 95113-2418
Telephone Number: (408) 294-6100
Facsimile Number: (408) 294-6190
Email Address: fred.schwinn@sjconsumerlaw.com

Attorney for Plaintiff
HERMINIA LORENZO CRUZ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HERMINIA LORENZO CRUZ,

Plaintiff,

v.

INTERNATIONAL COLLECTION
CORPORATION, a California corporation,
and CHARLES D. HENDRICKSON,
individually and in his official capacity,

Defendants.

Case No. C08-00991-JF-RS

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE
COMPLAINT**

Date: May 2, 2008
Time: 9:00 a.m.
Judge: Honorable Jeremy Fogel
Courtroom: 3, 5th Floor
Place: 280 South First Street
San Jose, California

COMES NOW the Plaintiff, HERMINIA LORENZO CRUZ, by and through counsel, Fred W. Schwinn of the Consumer Law Center, Inc., and submits her Memorandum of Points and Authorities in Opposition to the Defendants' Motion to Dismiss the Complaint.

NATURE OF THE CASE

This case was brought by HERMINIA LORENZO CRUZ against a debt collection agency, INTERNATIONAL COLLECTION CORPORATION, and the individual who operates and manages the collection agency, CHARLES D. HENDRICKSON. The Plaintiff alleges various violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (hereinafter "FDCPA"), which prohibits debt collectors from engaging in abusive, deceptive and unfair practices. Plaintiff seeks actual damages, statutory damages, attorney fees and costs under the FDCPA.

Plaintiff also alleges several tort causes of action, specifically invasion of privacy by intrusion upon seclusion, negligent collection, and tort-in-se. Plaintiff seeks actual and punitive damages for these tort causes of action.

QUESTIONS PRESENTED

1. Are allegations in the Complaint barred by the statute of limitations?
2. Does the Complaint state a claim against the Defendant collection agency?
3. Does the Complaint state a claim against the individual Defendant who operates and manages the collection agency?

ARGUMENTS AND AUTHORITIES

A. Standard for Motion to Dismiss

Defendants have filed a motion to dismiss this action for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In deciding a motion to dismiss, a district court must accept the facts alleged in the Complaint as true.¹ When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the factual allegations of the complaint are to be taken as true and construed in the light most favorable to the nonmoving party.² Generally, the Complaint should not be dismissed unless it appears that Plaintiff can prove no set of facts that would entitle him to relief.³

B. The “Least Sophisticated Consumer” Standard Is Used to Analyze Violations of the FDCPA.

The FDCPA states that its purpose, in part, is “to eliminate abusive debt collection practices by debt collectors.”⁴ The statute is designed to protect consumers from unscrupulous collectors,

¹ *Scheuer v. Rhoades*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

² *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

³ *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Also, see:* Wright & Miller, Federal Practice and Procedure, Civil 2d § 1357.

⁴ 15 U.S.C. § 1692(e).

whether or not there is a valid debt.⁵ The FDCPA broadly prohibits unfair or unconscionable collection methods; conduct which harasses, oppresses or abuses any debtor; and any false, deceptive or misleading statements, in connection with the collection of a debt.⁶ The FDCPA also requires the debt collector to provide the consumer with a notice of his or her validation rights.⁷

The United States Court of Appeals for the Ninth Circuit has held that whether a communication or other conduct violates the FDCPA is to be determined by analyzing it from the perspective of the “least sophisticated consumer.”⁸ The “least sophisticated consumer” standard is objective—not subjective.⁹ Courts determine whether the “least sophisticated consumer” would be misled or deceived by the statements made in a collection letter as a matter of law.¹⁰

“The basic purpose of the least sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.”¹¹ “While protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.”¹²

“As the FDCPA is a strict liability statute, proof of one violation is sufficient to support

⁵ *Baker v. G.C. Services*, 677 F.2d 775, 777 (9th Cir. 1982).

⁶ 15 U.S.C. §§ 1692d, 1692e, and 1692f.

⁷ 15 U.S.C. § 1692g.

⁸ *Swanson v. Southern Oregon Credit Serv.*, 869 F.2d 1222, 1225 (9th Cir. 1988); *Wade v. Regional Credit Ass’n*, 87 F.3d 1098, 1100 (9th Cir. 1996).

⁹ *Swanson*, 869 F.2d at 1227.

¹⁰ *Wade*, 87 F.3d at 1100; *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1977); *Swanson*, 896 F.2d at 1225-26.

¹¹ *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993).

¹² *U.S. v. Nat’l Fin. Servs.*, 98 F.3d 131, 136 (4th Cir. 1996) (citations omitted); *see also Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2nd Cir. 1993); *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985); *Graziano v. Harrison*, 950 F.2d 107, 111 (3rd Cir. 1991); *Avila v. Rubin*, 84 F.3d 222, 226-27 (7th Cir. 1996) (“the standard is low, close to the bottom of the sophistication meter”).

summary judgment for the plaintiff.”¹³ “Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages.”¹⁴ Furthermore, the question of whether the consumer owes the alleged debt has no bearing on a suit brought pursuant to the FDCPA.¹⁵

It is important to note that by protecting consumers from abusive, deceptive and unfair collection practices, the FDCPA insures that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.¹⁶ Moreover, the FDCPA further insures that regardless of whether a consumer owes a debt, he or she will be treated in a reasonable and in a civil manner.¹⁷

Accordingly, Plaintiff asserts that whether or not Defendants violated the FDCPA must be evaluated from the standpoint of the “least sophisticated consumer.”

C. Under the Strict Liability Standard of the FDCPA, Plaintiff Has Pled Numerous Violations of the FDCPA, as Seen from the Perspective of the “Least Sophisticated Consumer.”

To establish a violation of the FDCPA, one need only show that: (1) the plaintiff has been the object of collection activity arising from a consumer debt, (2) the defendant collecting the “debt” is a “debt collector” as defined in the Act, and (3) the defendant has engaged in any act or omission in violation of the prohibitions or requirements of the Act.¹⁸ Plaintiff has pled each of these

¹³ *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990); *see also Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 323 (E.D. Mich. 1992); *Riveria v. MAB Collections*, 682 F. Supp. 174, 178-9 (W.D.N.Y. 1988).

¹⁴ *Russell*, 74 F.3d at 33; *see also Taylor v. Perrin Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997); *Bentley*, 6 F.3d at 62; *Clomon*, 988 F.2d at 1318.

¹⁵ *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992); *Baker*, 677 F.2d at 777.

¹⁶ 15 U.S.C. § 1692(e).

¹⁷ *Baker*, 677 F.2d at 777.

¹⁸ *Kolker v. Duke City Collection Agency*, 750 F. Supp. 468, 469 (D.N.M. 1990); *Riveria v. MAB Collections, Inc.*, 682 F. Supp. 174, 175-76 (W.D.N.Y. 1988); *Withers v. Eveland*, 988 F. Supp. 942, 945 (E.D. Va. 1997); *Whatley v. Universal Collection Bureau, Inc.*, 525 F. Supp. 1204,

elements: (1) Plaintiff is a consumer,¹⁹ (2) Defendants are debt collectors,²⁰ and (3) Defendants violated various sections of the FDCPA.²¹

Because the FDCPA is a strict liability statute, proof of one violation is sufficient to defeat a motion to dismiss and support summary judgment for a Plaintiff.²² In light of this strict liability standard, a consumer need not show intentional conduct by the debt collector in order to be entitled to damages,²³ and there are no unimportant violations.²⁴ Further, no proof of deception or actual damages is required to obtain statutory remedies.²⁵

D. Plaintiff's Claims Are Not Barred by the Statute of Limitations.

1. Plaintiff's Claims Under the FDCPA Are Not Barred by the Statute of Limitations

Defendants have asserted that paragraphs 12-76 of the Complaint include facts which are

1206 (N.D. Ga. 1981).

¹⁹ Complaint (Doc. 1) ¶¶ 7 and 98.

²⁰ Complaint (Doc. 1) ¶¶ 8, 9, 99 and 100.

²¹ Complaint (Doc. 1) ¶ 102.

²² *See Hartman v. Meridian Financial Services, Inc.*, 191 F. Supp. 2d 1031, 1046-47 (W.D. Wis. 2002) ("One false or misleading statement in a collection letter renders the entire communication false or misleading and constitutes one violation"); *See also Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990); *Traverso v. Sharinn*, 1989 U.S. Dist. LEXIS 19100, *4 (D. Conn. Sept. 15, 1989); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62 (2nd Cir. 1993).

²³ *See Pittman v. J.J. Mac Intyre Co. of Nevada, Inc.*, 969 F. Supp. 609, 613 (D. Nev. 1997). *See also Russell*, 74 F.3d at 36 ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages.").

²⁴ *Bentley*, 6 F.3d at 63 (no non-actionable violations of FDCPA); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1234 (5th Cir. 1997) (failure "to comply with any provision of the FDCPA" leads to liability).

²⁵ *Baker*, 677 F.2d at 780.

1 barred by the FDCPA's one year statute of limitations, and therefore should be stricken.²⁶
 2 Defendants further assert that each cause of action should be dismissed because these facts are
 3 outside the FDCPA's statute of limitations.²⁷

4 While it is true that the FDCPA has a one year statute of limitation,²⁸ this is not a bar to
 5 Plaintiff's claims. Plaintiff has alleged that wrongful collection activities occurred within the year
 6 prior to filing this case.²⁹ Therefore, these facts, and the causes of action which rely on these facts,
 7 are not barred by the FDCPA statute of limitations. Moreover, to the extent the Complaint contains
 8 allegations regarding conduct outside of the FDCPA's one year statute of limitation, these
 9 allegations are admissible under the continuing violation theory of recovery recognized in the
 10 Northern District of California.³⁰ Therefore, any allegations which Plaintiff may have pled regarding
 11 facts outside the one year statute of limitations are not barred, as they relate to Defendants'
 12 continuing course of unlawful collection activities which violated the FDCPA.

13 Additionally, Plaintiff has pled facts which relate to causes of action with longer statutes of
 14 limitation than the FDCPA, as discussed in further detail below. Therefore, these facts should not
 15 and cannot be stricken from the Complaint.

16 For these reasons, Defendants' motion to dismiss should be denied as to this issue.

17 **2. Plaintiff's Claim of Invasion of Privacy by Intrusion Upon Seclusion is**
 18 **Not Barred by the Statute of Limitations**

19 Plaintiff's second cause of action is invasion of privacy by intrusion upon seclusion—a tort
 20 cause of action sounding in personal injury. Plaintiff has pled this cause of action seeking a
 21 recovery for her actual damages, including emotional distress, loss of sleep, loss of enjoyment of
 22

23 ²⁶ Defendants' Memorandum of Points in Authorities in Support of the Motion to Dismiss
 24 the Complaint (Doc. 10) (hereinafter "Defendant's Motion to Dismiss") 4:24 - 5:7.

25 ²⁷ Defendants' Motion to Dismiss (Doc. 10) at 5:5-8.

26 ²⁸ 15 U.S.C. § 1692k(d).

27 ²⁹ Complaint (Doc. 1) ¶¶ 77 - 86.

28 ³⁰ Joseph v. J.J. Mac Intyre Cos., L.L.C., 281 F. Supp. 2d 1156 (N.D. Cal. 2003).

1 life, humiliation, stress, lack of concentration, anxiety and embarrassment.

2 “An action for . . . injury to . . . an individual caused by the wrongful act or neglect of
3 another” is subject to a two year statute of limitations under California law.³¹ Therefore, factual
4 allegations outside of the FDCPA’s one year statute of limitation are not barred, as they are within
5 the two years provided for Plaintiff’s invasion of privacy cause of action. For this reason,
6 Defendant’s motion to dismiss should be denied as to this issue.

7 **3. Plaintiff’s Claim of Negligent Collection is Not Barred by the Statute of**
8 **Limitations**

9 Plaintiff’s third cause of action is negligent collection, which is also “[a]n action for . . .
10 injury to . . . an individual caused by the wrongful act or neglect of another,” and subject to a two
11 year statute of limitations.³² Therefore, factual allegations outside of the FDCPA’s one year statute
12 of limitations are not barred, as they are within the two years provided for Plaintiff’s negligence
13 cause of action. For this reason, Defendant’s motion to dismiss should be denied as to this issue.

14 **4. Plaintiff’s Claim of Tort-In-Se is Not Barred by the Statute of**
15 **Limitations**

16 Plaintiff’s fourth cause of action is tort-in-se, which is also “[a]n action for . . . injury to . . .
17 . an individual caused by the wrongful act or neglect of another,” and subject to a two year statute
18 of limitations.³³ Therefore, factual allegations outside of the FDCPA’s one year statute of
19 limitations are not barred, as they are within the two years provided for Plaintiff’s negligence cause
20 of action. For this reason, Defendant’s motion to dismiss should be denied as to this issue.

21 **E. The Complaint Alleges Facts Sufficient to Support Plaintiff’s Claims Under the**
22 **Fair Debt Collection Practices Act.**

23 Defendants argue that “[t]here are not facts in the complaint that allege specific facts
24 supporting” Plaintiff’s allegations that Defendants violated FDCPA 15 U.S.C. §§ 1692e(2)(A) and

25
26 ³¹ Cal. Civ. P. Code § 335.1.

27 ³² Cal. Civ. P. Code § 335.1.

28 ³³ Cal. Civ. P. Code § 335.1.

1 1692e(5).³⁴ However, there are sufficient facts alleged in the Complaint to sustain both of these
 2 alleged violations of federal law.

3 15 U.S.C. § 1692e(2)(A)

4 Plaintiff has alleged that, “Defendants misrepresented the character, amount or legal status
 5 of the debt, in violation of 15 U.S.C. § 1692e(2)(A).”³⁵ The facts to support violation are alleged
 6 in paragraphs 77 - 83 of the Complaint. This Court has found that similar facts violate this section
 7 of the Fair Debt Collection Practices Act.³⁶ Therefore, Defendants’ motion to dismiss should be
 8 denied as to this issue.

9 15 U.S.C. § 1692e(5)

10 Plaintiff has alleged that, “Defendants attempted or threatened to collect treble damages from
 11 Plaintiff pursuant to Cal. Civil Code § 1719, an action that cannot legally be taken or that was not
 12 intended to be taken, in violation of 15 U.S.C. § 1692e(5).”³⁷ The facts to support this violation are
 13 alleged in paragraphs 77 - 83 of the Complaint. This Court has found that similar facts violate this
 14 section of the Fair Debt Collection Practices Act.³⁸ Therefore, Defendants’ motion to dismiss should
 15 be denied as to this issue.

16 **F. The Complaint Sufficiently States a Cause of Action Against Defendant**
 17 **CHARLES D. HENDRICKSON.**

18 Defendants argue that, “Hendrickson is merely an officer of ICC. There are not facts set both
 19

20 ³⁴ Defendants’ Motion to Dismiss (Doc. 10) at 6:4-22.

21 ³⁵ Complaint (Doc. 1) ¶ 102(b).

22 ³⁶ *See, Hunt v. Check Recovery Systems.*, 478 F. Supp. 2d 1157 (N.D. Cal. 2007) (J. Jenkins)
 23 and *Palmer v. Stassinis*, 348 F. Supp. 2d 1070 (N.D. Cal. 2004), clarified on reconsideration by
 24 *Palmer v. Stassinis*, 419 F. Supp. 2d 1151 (N.D. Cal. 2005); *see also, Irwin v. Mascott*, 370 F.3d
 924, 927 (9th Cir. 2004).

25 ³⁷ Complaint (Doc. 1) ¶ 102(d).

26 ³⁸ *See, Hunt v. Check Recovery Systems.*, 478 F. Supp. 2d 1157 (N.D. Cal. 2007) (J. Jenkins)
 27 and *Palmer v. Stassinis*, 348 F. Supp. 2d 1070 (N.D. Cal. 2004), clarified on reconsideration by
 28 *Palmer v. Stassinis*, 419 F. Supp. 2d 1151 (N.D. Cal. 2005); *see also, Irwin v. Mascott*, 370 F.3d
 924, 927 (9th Cir. 2004).

[sic] in the Complaint that would hold him personally liable for any wrongful acts.”³⁹ However, the allegations in the Complaint, which must be taken as true for purposes of this motion, are that this Defendant “is a ‘debt collector’ within the meaning of 15 U.S.C. § 1692a(6).”⁴⁰ The Complaint further alleges, on information and belief, that this Defendant, “is liable for the acts of [International Collection Corporation] because he sets and approves [International Collection Corporation] collection policies practices, procedures, and he directed the unlawful activities described herein.”⁴¹ Finally, the Complaint alleges that, “[a]t all times herein mentioned, each of the Defendants was an officer, director, agent, servant, employee and/or joint venturer of his co-defendants, and each of them, and at all said times, each Defendant was acting in the full course and scope of said office, directorship, agency, service, employment and/or joint venture.”⁴²

The Complaint alleges that HENDRICKSON set and approved the collection policies, practices and procedures used by INTERNATIONAL COLLECTION CORPORATION and that he directed the unlawful activities described in the Complaint. The Complaint alleges facts sufficient to establish liability under the FDCPA as to Defendant, CHARLES D. HENDRICKSON. Therefore, Plaintiff’s Complaint states a cause of action against this Defendant, and the motion to dismiss should be denied as to this issue.

CONCLUSION

The Complaint filed in this case properly alleges facts sufficient to state causes of action against all Defendants under the Fair Debt Collection Practices Act, Negligence, Invasion of Privacy and Tort-in-Se. All facts alleged are within the relevant statute of limitations for each of these causes of action. Finally, the Complaint sufficiently alleges facts to state a claim against the individual Defendant, HENDRICKSON. Therefore, Plaintiff respectfully requests that this Court deny Defendants’ Motion to Dismiss in its entirety and find that Plaintiff’s Complaint states claims

³⁹ Defendant’s Motion to Dismiss (Doc. 10) at 7:5-7.

⁴⁰ Complaint (Doc. 1) ¶¶ 9 and 100.

⁴¹ Complaint (Doc. 1) ¶ 9.

⁴² Complaint (Doc. 1) ¶ 10.

1 upon which relief can be granted by this Honorable Court.

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3 CONSUMER LAW CENTER, INC.

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5 Dated: April 10, 2008

6 By: /s/ Fred W. Schwinn
7 Fred W. Schwinn, Esq.
8 Attorney for Plaintiff
9 HERMINIA LORENZO CRUZ
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